Supreme Court, U.S.
FILED

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UNITED STATES SUPREME COURT

LOUIS F. GAINES,
Plaintiff - Petitioner

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et Al.,
Defendants - Respondents

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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317 -- 283 - 4821

78 pp

QUESTIONS FOR REVIEW

1. For EEOC Charge #240-A1-0803: Since Pro Se Plaintiff: (1) timely opposed the Defendants' unlawful Age & Race discrimination in employment; and, (2) immediately received a "Hostile Reply" from the Defendants, who "Silenced" him - was the Plaintiff required to subject himself to additional discrimination, humiliation, retaliation, and/or threats - in order to qualify for judicial relief? See PP. 5 - 6.

2. For EEOC Charge #240-A1-0879: (1) charge was filed against the Defendants on January 29, 2K01; (2) for the "Date Discrimination Took Place," Pro Se Plaintiff listed "12/26/2000" and "1/11/2001; (3) the District Court overlooked this charge in its review; and, (4) the Seventh Court determined that the above charge was untimely filed. If Pro Se Plaintiff has been denied due process, and/or equal protection of the law, then what relief is due? See PP. 7-8.

3. For EEOC Charge #240-A1-1110: (1) on January 22, 2K01, EEOC Charge #240-A1-0803 was filed; (2) on January 25, 2K01, the Defendants suddenly required the Operations Specialists to perform large scale, and long term "Union duty: cleaning primarily;" (3) the Plaintiff, however, was required to do more than his fair share of cleaning, and to document such cleaning, unlike others; and, (4) the Lower Courts determined that the Plaintiff has <u>not</u> suffered any adverse treatment. If the Plaintiff has been denied due process and/or equal protection of the law, then what relief is due? See P. 8.

4. For EEOC Charge #240-99-1616: (1) in 1999, the Defendants were the first to file a summary judgment motion against Pro Se Plaintiff; (2) he was not allowed to amend his Complaint on any authority, or under any circumstance; (3) in 2K01, Pro Se Plaintiff was the first to file a summary judgment motion; (4) afterwards, the Defendants filed two motions to amend, and they were granted; and (5), the Defendants were then granted a favorable summary judgment, which was partially influenced by one or both amended motions. If the Plaintiff has been denied due process, and/or equal protection of the law, then what relief is due? See P. 9.

5. Reference the "Doctrine of Continuing Violation:" (1) between the period of December 1, 1999 and June 1, 2K03; Pro Se Plaintiff has filed five unlawful discrimination in employment suits against the Defendants; (2) such suits were provoked by the Defendants, and Pro Se Plaintiff's attempt to defend or protect his civil and constitutional rights; (3) the Lower Courts have determined that some complaints were untimely filed; and, (4) the Lower Courts have consistently denied all relief. If the Lower Courts have erroneously withheld the protection of the "Doctrine of Continuing Violation" from Pro Se Plaintiff - then what relief is due? See P. 16,

6. Reference the Plaintiff's on-the-job, "Irreparable Injury" that the Defendants caused him to willfully suffer during "Discovery," in 1999. What relief, if any, is the Plaintiff due? See PP. 3-5.

7. What other relief is the Plaintiff due?

LIST OF PARTIES

1. LOUIS F. GAINES, Petitioner
   5337 North College Avenue
   Indianapolis, IN 46220-3141

2. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et. Al., Respondent
   2700 South Belmont Avenue
   Indianapolis, IN 46221

3. IWC RESOURCES CORPORATION, Managing Partner, and Respondent
   1220 Waterway Boulevard
   Indianapolis, IN 46206

4. SUEZ, Partner, and Respondent
   16 Rue De La Ville Leveque
   75383 Paris Cedex 08
   France

5. UNITED WATER SERVICES, Inc., Partner, and Respondent
   200 Old Hook Road
   Harrington Park, NJ 07640

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UNITED STATES CONSTITUTION:

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TITLE 28 U. S. C.

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§ 1983, P. 2.

§ 2000e-2(a), PP. 2 & 12.

§ 2000e-2(k)(c)(2), PP. 2 & 12.

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FEDERAL RULES OF:

Appellate Procedure, Rule 35, PP. 2 & 17.

Civil Procedure, Rule 56, PP. 2, 11, 12, 15, 17 & 19.

Evidence, Rule 406, PP. 2 & 21.

CITATION OF OPINIONS OR REPORTS

LOUIS F. GAINES v. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et Al.:

530 U.S. 1230; 120 S. Ct. 2661; 147 L. Ed. 2d 275; June 12, 2000.

534 U.S. 952; 122 S. Ct. 349; 151 L. Ed. 2d 263; October 9, 2001.

202 F.3d 272; January 3, 2000.

248 F.3d 1157; March 23, 2001

No. 02-3849, April 4, 2003; see Appendix A.

IP-01-1158-H/K, September 30, 2002; Ibid., B.

No. 023849, May 12, 2003; Ibid., C.

IP 98-1741-C-M/S, August 19, 1999, and October 25, 1999; 00-3802, March 23, 2001, and May 17, 2001; Ibid., D

JURISDICTION OF THE SUPREME COURT

One, the "Order" of the Seventh Court was entered on April 4, 2K03. See Appendix A., P. 1. Two, Rule 11 does not apply. Three, the Petition for a Rehearing was denied on May 12, 2K03. Ibid., B., P. 29. Finally, this matter comes to the Supreme Court on the authority of Title 28, U.S.C., § 1254.

CONSTITUTION & OTHER AUTHORITY

United States Constitution: the Fifth, Eighth, and Thirteenth Amendments. See Appendix E, Page 43.

Title 29, U.S.C., §§ 623(a) & 623(d). Ibid.

Title 42, U.S.C., §§ 1981, 2000e-2(a), 2000e-2(k)(c)(2), 2000e-2(m), and 2000e-3(a). Ibid., PP. 44-5.

Federal Rules of: (1) Appellate Procedure, Rule 35; (2) Civil Procedure, Rule 56; and, (3) Evidence, Rule 406 - Ibid., PP. 45-7.

STATEMENT OF THE CASE

Jurisdiction Of The Lower Courts:

1. This case of unlawful discrimination in employment was timely brought to the United States District Court, Southern District of Indiana, at Indianapolis; on August 9, 2K01. Jurisdiction, however, was based on the following authority: (1) Title 28, U.S.C., §§ 1331, 1332 & 1343(a); (2) Title 29, U.S.C., §§ 626(c), 626(d), 659, 660, and 666; (3) Title 42, U.S.C., §§ 1391(b), 1981, 1983, and 2000e-5; and, (4) the United States Constitution, First, Fifth, Eighth, and Thirteenth Amendments.

2. On September 30, 2K02, the District Court

entered a summary judgment for the Defendants. On October 25, 2K02, the case was timely appealed to the Seventh Court, and on the authority of Title 28, U.S.C., § 1291.

Material Facts To Consider:

Motions to amend, and summary judgments:

1. On October 2, 2K02, Pro Se Plaintiff filed a summary judgment motion, with all the supporting documents. See Appellant's Brief, Appendix: "Docket Sheet," P. 37, Items #14-18.

2. On February 13, 2K02, the Defendants filed a motion to amend their "Answer." Ibid., #35. On September 30, 2K02, the District Court granted the Defendants' motion to amend. Ibid., P. 40, #83. Also see current Appendix B, P. 13., ¶ 8.

3. On March 8, 2K02, the Defendants' motion for summary judgment was filed. Appellant's Brief, Appendix, P. 38, Items #52-56.

4. On April 1, 2K02, the Defendants filed a motion to correct their defective affidavits. Ibid., P. 39, #66. On September 30, 2K03, the District Court granted the above motion. Ibid., P. 40, #83. Also see current Appendix B, P. 11, ¶ 4.

5. After granting the Defendants' motions to amend, the Defendants' summary judgment motion was then granted, and the Plaintiff's was denied. See Appellant 's Brief, Appendix, P. 41; and, current Appendix B, P. 26 & 27.

6. In *Gaines v. White River Environmental Partnership, et al.*, IP-98-1741-C-M/S; the Defendants caused the Plaintiff to suffer an on-the-job, "Irreparable Injury" on June 2, 1999. On June 10, 1999, the Plaintiff: (1) filed a motion to amend; (2) he was not allowed to amend his Complaint before July 9, 1999, the day in which the Defendants' summary judgment motion was filed; and, (3) he was not allowed to amend after July 9, 1999, either. See Appellant's Brief, P. 6., to include reference to medical documentation. Also see current Appendix D, P. 34., and other relevant evidence on PP. 32-38.

7. On March 23, 2001, the Seventh Court affirmed the summary judgment for the Defendants in ..., 98-1741-C-M/S. See Appendix D., PP. 38-9.

8. On May 17, 2001, the Seventh fined Pro Se Plaintiff $1,000.00 for filing a "frivolous appeal," as determined by the Seventh Court. Ibid., P. 41.

9. On April 4, 2K03, the Seventh Court affirmed the summary judgment for the Defendants in ..., IP-01-1158-C-H/K. Ibid., Appendix A., P. 3.

10. In its "Order" of April 4, 2K03, the Seventh Court issued another warning to Pro Se Plaintiff, about bringing "frivolous arguments" to the Seventh Court. Ibid., P. 8.

11. On May 12, 2K03, Pro Se Plaintiff's Petition for a Rehearing was denied. Ibid., Appendix C., P. 30.

EEOC Charge #240-A1-0803:

1. Charge alleged unlawful Age and Race discrimination.

2. As early as June, 1997, the Plaintiff attempted to get the Defendants to allow him to serve as a replacement for a Shift Supervisor. See Appellant Reply Brief,, Appendix, P. 28.

3. In April or May 2K, the Defendants secretly, or very selectively, notified Mr. G. Sawyer, 33, and "White," that they were looking for someone to serve as a temporary Shift Supervisor. The Defendants also withheld the same information from the Plaintiff, 55, and "Black." See Appellant's Brief, PP. 9-10.

4. On May 11, 2K, the Defendants used E-mail to widely announce Mr. G. Sawyer's selection. See Appellant's Reply Brief, Appendix, P. 30: Ex. #307.

5. On May 11, 2K, Pro Se Plaintiff opposed Mr. Sawyer's selection to serve as a temporary Shift Supervisor. Ibid., Appendix, P. 31: Ex. #308.

6. On May 12, 2K, the Defendant issued a hostile reply to Pro Se Plaintiff. Ibid., Appendix, P. 32: Ex. #309.

7. Also on May 12, 2K, the Defendants "Silenced" Pro Se Plaintiff by writing, "Louis, ..., I expect to hear no more from you on this subject." Ibid., Appendix, P. 33: Ex. #310.

8. After being "Silenced" on May 12, 2K, the Plaintiff was discouraged from competing with Mr. Sawyer for this employment opportunity. See Appellant's Brief, P. 10, ¶ Three, Item Seven. Also see Appellant's Reply Brief, P. 9, ¶ 21.

9. Between the period of May 12, 2K, and October 1, 2K, Mr. Sawyer released information, in the presence of the Plaintiff, that he, Mr. Sawyer; has already been promoted, but not officially. Appellant's Reply Brief; P. 9 ¶ 22.

10. On October 1, 2K, the Defendants promoted Mr. G. Sawyer to the position of Shift Supervisor, or Supervising O & M Specialist, by another name. Ibid., Appendix, P. 36: Ex. #315, Second Page.

11. After promoting Mr. Sawyer on October 1, 2K, this same position was then posted on October 24, 2K, for others to apply or bid. See ¶ 10, above.

12. In its "Order " of April 4, 2K03, the Seventh Court did the following: (1) determined that EEOC Charge #240-A1-0803 was timely; (2) that Pro Se Plaintiff is not entitled to any relief, because he failed to apply for the position that Mr. Sawyer was promoted to; (3) that the Plaintiff has not suffered any adverse treatment; and, (4), affirmed the ruling of the District Court to this extent. See Appendix A., PP. 5-7.

13. On May 12, 2K03, and to the extent of the above, Pro Se Plaintiff's Petition for a Re-hearing was denied. Ibid., Appendix C, P. 30.

EEOC Charge #240-A1-0879

1. Charge was filed on January 29, 2K01, alleging unlawful Race discrimination, and Retaliation. See Complaint, P. 17. Also see Appellant's Brief, PP. 11-13, starting with ¶ 9.

2. For the "Date Discrimination Took Place," the Plaintiff listed "12/26/2000 ," and "1/11/2001;" and "Continuing. Complaint, P. 17.

3. In granting the Defendants' motion for a summary judgment, on September 30, 2K02, the District Court completely overlooked this charge, or failed to address it. See Appendix B., PP. 15-28. Also see Appellant's Brief, P. 13.

4. The Seventh Court, in its "Order" of April 4, 2K03; denied all relief on the claim that EEOC Charge #240-A1-0879 was untimely filed. Ibid.. Appendix A., P. 5. Also see ¶¶ 1 & 2 above.

5. In a step-by-step approach, with supporting exhibits, Pro Se Plaintiff attempted to reveal to the Seventh Court that EEOC Charge #240-A1-0879 was timely filed in every respect. See Appellant's Petition for a Rehearing En Banc, PP. 4-6.

6. On May 12, 2K03, all relief was denied by the following standard. Ibid., P. 30:

ORDER

On consideration of the petition

for rehearing en banc filed by plaintiff, no judge in active service has requested a vote on the petition for rehearing en banc, and all the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

EEOC Charge #240-A1-1110:

1. Charge alleged unlawful Age and Race discrimination, and Retaliation. See Complaint, P. 20. Also see Appellant Brief, PP. 13-14.

2. On January 25, 2K01, the Defendants told the Plaintiff that a "Verbal" agreement had been reach with the local union to allow the Operation Specialist to perform "Union Duty." Ibid.

3. When the Plaintiff requested a written statement to document the above claim, the Defendants denied the request. Ibid.

4. Forcing the Plaintiff to perform "Union Duty," placed him at a greater risk of being injured on-the-job; the assignment discouraged continued employment, and it lowered the status of the "Operation Specialist." Ibid.

5. The Seventh Court determined the following: (1) the Plaintiff has not suffered adverse treatment, and (2) the Plaintiff has failed to establish prima facie discrimination. See Appendix A., PP. 3 & 6.

6. The Petition for a Rehearing was also denied to this extent. See Appendix C., P. 30.

Plaintiff's "Irreparable Injury:"

1. See P. 4., ¶ 6.

2. Since June 10, 1999, Pro Se Plaintiff has been trying to hold the Defendants accountable for the above injury; however, such attempts have failed. Ibid., P. 4.

3. Under no circumstance, and under no authority has Pro Se Plaintiff been able to hold the Defendants responsible for his on-the-job, "Irreparable Injury," which needlessly took place on June 2, 1999.

4. EEOC Charge #240-99-1616, May 7, 1999; for example, does not contain any language relating to an "Irreparable Injury," because the foregoing injury occurred on June 2, 1999. See Complaint, P. 12. Also see Appellant's Brief,, PP. 7-9; see Appellant's Reply Brief, PP. 3-8; see Appellant's Petition For A Rehearing En Banc, PP. 2-4; and, see Appendix D., PP. 32-37.

Time limitations:

In its "Order" of April 4, 2K03, the Seventh Court wrote the following. See Appendix A., PP. 4-5:

... Title VII and the ADEA, however,

require plaintiff to meet strict deadlines: in Indiana, EEOC charges must be filed within 300 days of the alleged incident of race or sex discrimination, and within 180 days of the alleged incident of age discrimination.

ARGUMENT

Summary: The evidence fairly and sufficiently show that the lower courts have consistently used a standard of review that is inconsistent with the relevant standards of the United States Supreme Court, and the intent of the United States Congress. In other words, Pro Se Plaintiff has been categorically denied due process and equal protection of the law; therefore, the review of the Supreme Court is necessary for: (1) the benefit of all, (2) providing a standard in which the Plaintiff can be granted all due relief; and (3) preventing the Defendants from being allowed to willfully violate the Plaintiff's civil and constitution rights and then escape all accountability or punishment for such unlawful conduct.

I. Pro Se Plaintiff Has Been Denied Due Process & Equal Protection Of The Law, As It Applies To Motions To Amend, And Summary Judgment Procedure

A. Legal standards

1. United States Constitution, Fifth Amendment;

Title 42 U.S.C. § 1981, 1981(c); Federal Rules of Civil Procedure, Rule 56(c) & 56(e). See Appendix E, PP. 43-8.

2. Court cases:

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505; 1986:

> 2. Federal Civil Procedure
>
> Substantive law will identify which facts are material for purpose of summary judgment, as only disputes over facts that might affect the outcome of suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Federal Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

Gilbert v. Homar, 138 L Ed 2d 120, 121; 1997:

> Constitutional Law
>
> 4. Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedure protections as the particular situation demands.

B: Argument: One, the evidence shows that

when the Defendants were the first to file a motion for summary judgment, Pro Se Plaintiff was not allowed to amend on any authority, or under any circumstances. See P. 4. Two, when the Plaintiff was the first to file a summary judgment motion, the Defendants were allowed to freely amend, or such motions were freely granted. See P. 3. Three, the Defendants' motions to amend were designed to affect the outcome of the case, and they did. See P. 3., ¶ 5. Four, based on the foregoing, the Defendants' summary judgment motion was inappropriately granted, and the Plaintiff's was inappropriately denied. Five, the Plaintiff is entitle to all due relief. See PP. 3-4.

II. Once An Unlawful Employment Practice Is Reasonably Opposed - The Adversely Treated Employee Is Not Required To Suffer Additional Discrimination, Humiliation, Retaliation, Or Threats; In Order To Obtain Judicial Relief

A. Legal standards:

1. United States Constitution, the Fifth, Eighth, and Thirteenth Amendments; Title 29, U.S.C., § 623(a), and 623(d); Title 42, U.S.C., §§ 1981, 1981(c), 2000e-2(a), 2000e-2(k)(c)(2), 2000e-3(a); and, Federal Rules of Civil Procedure, Rules 56(c) & 56(e). See Appendix E., PP. 43-8

2. Court cases: See *Anderson v. Liberty Lobby, Inc.*, and *Gilbert v. Homar;* P. 11. Also see the following cases:

Harris v. Forklift Systems, Inc., 126 L Ed -

2d 295; 1993:

> Civil Rights § 7.6, 7.7
>
> ...; Title VII comes into play, however, before the harassing conduct leads to a nervous breakdown, and (2) ..., the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality.

O'Connor v. Consolidated Coin Caterers Corp., 134 L. Ed 2d 433; and, 116 S.Ct. 1307, 1308; 1998:

> Decision: In suit under Age Discrimination in Employment Act, (1) replacement by person under 40 held not proelement of prima facie case, and (2) fact that replacement is substantially younger held to be more reliable indicator.
>
> 3. Civil Rights
>
> The ADEA prohibits discrimination on the basis of age and not class membership Age Discrimination Act of 1967, § 2 et seq., as amended, 29 U.S.-C. A., § 621 et seq.

McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1818; 1973.

4. Civil Rights

In implementation of employment and personnel decisions, Title VII of the Civil Rights Act of 1964 tolerates no racial discrimination, subtle or otherwise. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

B. Argument: One, see PP. 5-6. Two, any form of unlawful discrimination in employment - is an act of "Adverse Treatment; and, the victim is entitled to reasonable relief at that point. Three, once an unlawful employment practice is reasonably opposed, the complaining employee, or the victim, is not required to suffered additional discrimination, humiliation, or threats - in order to obtain judicial relief. Four, Pro Se Plaintiff reasonably and timely opposed the Defendants' unlawful Age and Race discrimination against him. Five, afterwards, the Defendants became "Hostile" toward the Plaintiff, and he was "Silenced." Six, the Defendants used an unlawful selection procedure that discriminated against the Plaintiff on the basis of Age and Race. Seven, since the Defendants' summary judgment motion was inappropriately granted, and since the Plaintiff's was inappropriately denied - it follows that the Plaintiff is entitled to all due relief.

III. EEOC Charge #240-A1-0879 Was Very Timely Filed

A. Legal standards:

1. See P. 9., "Time limitations."

2. See United States Constitution, Fifth Amendment; Title 42, U.S.C., § 1981; and the Federal Rules of Civil Procedure, Rule 56; Appendix E., PP. 43-8.

B. Argument: One, see PP. 7-8. Two, the Lower Courts could not reasonably ask for a more timely filing. Three, to the extent of the foregoing, Pro Se Plaintiff has been denied due process and equal protection of the law; and, the summary judgment for the Defendants was inappropriately entered, and the Plaintiff's was inappropriately denied.

IV. Pro Se Plaintiff Is Entitled To Protection Of "Continuing Violation Doctrine," Too

A: Legal standards:

1. See United States Constitution, Fifth Amendment; Title 42 U.S.C., § 1981; and, the Federal Rules of Civil Procedure, Rule 56; Appendix E., PP. 43-8.

2. See the case of *Gilbert v. Homar*, P. 11. Also see the following cases:

McCormick v. City of Chicago, 30 F.3d 319 (7th Cir. 2000):

5. Federal Civil Procedure

Pro se complaints are to be liberally construed and not held to the stringent standards expected of pleadings drafted by lawyers.

Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 391 (7th Cir. 1999):

2. Civil Rights

Continuing violation doctrine allows a Title VII complainant to obtain relief for time-barred act of discrimination by linking it with acts that fall within the statutory limitations periods; courts will then treat the series of acts as one continuous act ending within limitations period. Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.-C.A. § 2000e-5(e).

3. Civil Rights

Courts will consider three factors in determining whether employee has established continuing violation under Title VII: (1) whether the acts involve the same subject matter; (2) the frequency at which they occur; and (3) the degree of permanence of alleged acts of discrimination, which should trigger an employee's awareness of and duty to assert his or her rights. Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.C.A. § 2000e-5(e).

B. Argument: One, see PP. 1-17. Two, the Defendants continually and willfully violate the Plaintiff's civil and constitutional rights, but absolutely nothing is ever done by the Lower Courts to hold them accountable. Three, the Defendants are not above the law. Four, the Defendants must be made to comply with the requirements of "Equal Employment Opportunity." Five, Pro Se Plaintiff is entitled to the protection of the "Continuing Violation Doctrine," like all other members of a protected class. Six, in at least one instance, the Seventh Court found one EEOC charge timely filed. See P. 6., ¶ 12. Seven, to the extent of the above, the Defendants' summary judgment was inappropriately entered, and the Plaintiff's was inappropriately denied. Eight, Pro Se Plaintiff is entitled to all due relief.

V. Pro Se Plaintiff's Petition For A Rehearing En Banc Was Denied In Error

A. Legal standards

1. See the United States Constitution, Fifth Amendment; Title 42, U.S.C., § 1981; and, the Federal Rules of Civil Procedure, Rule 56; Appendix E., PP. 43-8.

2. See the Federal Rules of Appellate Procedure, Rule 35. Ibid., P. 42:

> Rule 35. En Banc Determination
>
> (b)(1)(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which

the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(b)(1)(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of the United States Court of Appeals that addressed the issue.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

3. Also see the case of *Gilbert v. Homar,* P. 11.

B. Argument: One, see PP. 7-8. Two, to allow all the existing errors to stand against the Plaintiff, a panel of the Seventh Court denied the Petition for a Rehearing En Banc, by presenting or writing a "Standard" which is contrary to the published standard of the Seventh Court, and the United States Congress. See P. 7., ¶ 6, and compare it with Rule 35(f), as quoted above! Three, one "Standard" is clearly different than the other!

VI. Pro Se Plaintiff Is Entitled To Fair Monetary Relief For The On-The-Job, "Irreparable Injury" That The Defendants Have Willfully Caused Him To Suffer

A. Legal standards:

1. See the United States Constitution, the Fifth, Eighth, and Thirteenth Amendments; Title 29, U.S.C., § 623(d); Title 42, U.S.C., §§ 1981, and 2000e-3(a); and, the Federal Rules of Civil Procedure, Rule 56 - Appendix E., PP. 42-8.

2. See the court cases of *Anderson v. Liberty Lobby, Inc., & Gilbert v. Homar,* P. 11.; *Harris v. Forklift Systems, Inc.,* PP. 12-3; *McDonnell Douglas Corp. v. Green,* P. 14.; and, *Filipovic v. K & R Express Systems, Inc.,* P. 16.

3. Also see the following cases:

Lujan v. Defenders of Wildlife, 112 S.Ct 2130, 2131; 1992:

> 7. Federal Civil Procedure
>
> At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing; in response to summary judgment motion, plaintiff can no longer rest on mere allegations but must set forth by affidavit or other evidence the specific facts which will be taken as true for purpose of summary judgment; at the final stage, those

facts if controverted, must be supported adequately by evidence adduced at trial. Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.

Curtis 1000, Inc. v. Suess, 24 F.3d 941 (7th Cir. 1994):

3. Torts

Tort of intentional interference with advantageous business relations no longer requires that relation interfered with be one embodied in formal contract.

Kolstad v. American Dental Ass'n, 119 S.Ct. 2118, 2119; 1999:

6. Damages

Egregious or outrageous acts may serve as evidence supporting inference of evil motive required to impose punitive damages.

B. Argument: One, see PP. 3-4, and P. 6. Two, a double-standard has surely been maintained against Pro Se Plaintiff, which has produced a "Substantial Injustice" against him. Three, the Defendants are guilty of a willful on-the-job, "Irreparable Injury" against the Plaintiff. Four, every summary judgment for the Defendants should be reversed, because such judgments were

inappropriately entered. Five, the Defendants are not above the "Law." Six, the Plaintiff is entitled to all due relief.

Conclusion

The evidence fairly and sufficiently show that the Lower Courts have entered judgments that are in conflict with relevant rulings of the United States Supreme Court, and the intent of Congress. Beneath the foregoing rulings lies the constant and real threat that Pro Se Plaintiff will be sanctioned by the Seventh Court for trying to defend, and protect his civil and constitutional rights against the Defendants, who are willful violators of the laws of "Equal Employment Opportunity." See PP. 1-21; Appendix A., P. 8; and, Appendix E., P. 47, " Rule 406." Clearly, the review of the Supreme Court is needed - in light of all the above. Pro Se Plaintiff is entitled to all due relief. See PP. 10-21, and Appendix E., PP. 43-48; for the authority to grant such relief.

Sincerely,

LOUIS F. GAINES, July 31, 2K03
Pro Se Plaintiff,

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UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 27, 2003
Decided April 4, 2003

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Ann Claire Williams, Circuit Judge

No. 02-3849

LOUIS F. GAINES,
Plaintiff-Appellant

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,
Defendants-Appellees

Appeal from the United States District for the Southern District of Indiana, Indianapolis Division

No. 01 C 1158

David F. Hamilton, Judge

ORDER

Louis Gaines began working for the defendants ('White River') at their wastewater treatment plant in 1994. Since then, he as repeatedly sue White River for discrimination, resulting in several appeals that we have previously resolved. See e.g., *Gaines v. White River Environ. P'ship.* No. 00-3802, 2001 WL 298592 (7th Cir. March 23, 2001). In this lawsuit Gaines argues that he has been the victim of discrimination and retaliation, especially in regard to several key decisions made by White River--their alleged failure to promote him and their transferring him temporarily to a less desirable (and more dangerously) department. The district court granted summary judgment to the defendants. We affirm.

After an examination of the briefs and record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

After exhausting his administrative remedies by filing charges of discrimination with the EEOC and receiving right-to-sue, Gaines, an African-American in his 50's, filed this suit against White River. Gaines' complaint alleges numerous instances of discrimination, including that White River paid him less that white employees, credited him with less seniority than white employees, and assigned him additional undesirable duties. He argues that this conduct violated several civil rights statues, including 42 U.S.C. § 1981, Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e

et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq., and 42 U.S.C. § 1983, and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78. (Gaines' complaint makes some additional allegations that he first raised in an EEOC charge filed in August 2001. But we have found no right-to-sue letter issued to Gaines on that charge in the record, and therefore those allegations appear to have been made prematurely.) Both parties subsequently filed cross-motions for summary judgment.

The district court granted summary judgment for White River on all Gaines' claims, and at the same time denied Gaines' summary judgment motion. The court held that many of Gaines' claims were time-barred either because he filed an EEOC charges containing those claims too late, or because he waited too long to file suit after receiving a right-to-sue letter. The court also held that Gaines failed to establish a prima facie case of discriminatory treatment under Title VII, the ADEA or § 1981, and had failed to establish a prima facie case of retaliation. Finally, the court held that Gaines failed to established a claim under § 1983 (because White River was not a state actor) or OSHA (because OSHA provides no private right of action).

Gaines argues first (without elaboration) that all of his discrimination and retaliation claims were timely and that district court erred when it concluded that some were time-barred. Title VII and the ADEA, however, require plaintiffs to meet strict deadlines: in Indiana, EEOC charges must be filed within 300 days of the alleged incident of race or sex discrimination, and within 180 days of

the alleged incident of age discrimination. *EEOC v. N. Gibson Sch. Corp.*, 266 F.3d 607, 617 (7th Cir. 2001) (ADEA); *Minor v. Ivy Tech State College*, 174 F.3d 855, 857 (7th Cir. 1999)(Title VII). Gaines waited until 2001 to file charges stemming from White River's alleged failure in 1994 and 1995 to offer him the same pay and seniority it offered white employees, well in excess of the 300-day limit for Title VII claims and 180-day limit for ADEA claims. Gaines also missed the deadline to file suit in the district court on his claim based upon his transfer to a less desirable department. After the EEOC issued his right-to-sue letter on that claim in July 1999, Gaines had 90 days to file suit in the district court, see *Grayson v. O'neill*, 308 F.3d 808, 817 (7th Cir. 2002), but he waited more than two years (until August 2001) before doing so. We agree with the district court that these claims are time-barred.

We disagree with the court, however, that the time for filing had lapsed on another claim-- based upon White River's alleged decision in October 2000 to promote a white employee rather than Gaines. Gaines filed the charge in January 2001--within both the 180-day deadline for filing a claim based upon age discrimination and the 300-day for filing a claim based on race or sex discrimination. He also timely filed this complaint in August 2001, less than 90 days after receiving his right-to-sue letter in May 2001. Therefore this failure-to-promote is not time barred.

Although many of Gaines' claims are time-barred, he made other claims of discrimination and

retaliation that are timely (in addition to his failure-to-promote claim). Most of these other claims involved changes in his work assignments or reprimands for disobeying orders. As for the merits of his timely claims, Gaines submitted no evidence under the direct method of proving discrimination or retaliation and, therefore, must proceed under the indirect method articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that approach, Gaines must first establish a *prima facie case.* The elements that Gaines must demonstrate to establish a prima facie case vary by claim, but one requirement common to all of Gaines' claims is that he offer evidence that he suffered an adverse employment action. See, *e.g., Lalvani v. Cook Co., Ill.*, 269 F.3d 875, 789 (7th Cir. 2001) (discrimination under Title or § 1981); *Koski v. Standex Int'l Corp.*, 397 F.3d 672, 676 (7th Cir. 2002) (discrimination under ADEA); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir.), cert. denied, 123 S. Ct. 79 (2002) (retaliation).

We agree with the district court's determination that Gaines failed to establish that he had suffered any adverse employment action. Most of the employment actions he challenges in this suit--the changed work assignments and reprimands -- resemble actions in one of his prior appeals. As we discussed in our prior order, none of these actions amounted to adverse employment actions because they did not materially change the terms or conditions of his employment. See, *Gaines, 2001 WL 298592,* at * 1; see also *Tyler v. Ispat Inland, Inc.*, 245 F.3d 969, 972-73 (7th Cir. 2001); *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 613 (7th

Cir. 2001).

The only act that Gaines identified in this complaint that differs from the acts he alleged in his previous suit is White River's alleged decision to promote a white employee over him. Gaines admits, however, that he never applied for the promotion even though he knew about the opportunity to do so. (Plaintiff's Statement of Material Facts No In Dispute at ¶¶ 31-32. To establish that White River's failure to promote him amounted to an adverse employment action, Gaines must demonstrate that he applied for the promotion. *Grayson,* 317 F.3d at 748. His admission that he did not leaves him unable to establish a *prima facie* case, and

the district court therefore correctly granted summary judgment to White River on his Title VII, § 1981, and ADEA claims.

Summary judgment on Gaines' remaining two claims was also appropriate . First, Gaines submitted no evidence (and has not even argued) that White River acted under color of state law for purposes of his §1983 claim. *Gayman v. Principal Fin. Servs., Inc.,* 311 F.3d 851, 852 (7th Cir. 2002). Second, Gaines cannot state a claim under OSHA because that statue offers him no private right of action. *Am. Fed. Of Gov't Employees, AFL-CIO v. Rumsfield,* 312 F.3d 139, 144-45 (D.C. Cir. 2003); *Mason v. Ashland Exploration, Inc.,* 965 F.2d 1421, 1425 (7th Cir. 1992).

Finally, we note that we sanctioned Gaines in two of his previous appeals, once for appealing interlocutory orders and a second time for making spurious allegation against the district judge and defense counsel. While his argument in this appeal do not repeat his earlier errors, they border on the frivolous. We therefore warn Gaines any future appeal that raises frivolous arguments will result in further sanctions.

Accordingly, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES, Plaintiff	)	
v.	)	IP-01-1158-H/K
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	

ENTRY DISCUSSING NON-DISPOSITIVE MOTIONS

Louis F. Gaines has sued this employer, White River Environmental Partnership, and affiliated entices (hereafter collectively "WREP" or "defendants) for what he asserts to be its discrimination against him on the basis of his race, sex and age and for retaliation against him. A multitude of non-dispositive motions are pending.

Whereupon the court, having read and considered the motions and responses thereto, and having also considered the evidentiary record, and being duly advised, now finds that the non-dispositive motions are properly resolved as specifically noted in this Entry.

I Specific Motions

The specific motions identified below are granted or denied, or otherwise resolved, through the following:

1. WREP's motions for instructions are granted, consistent with the specific rulings in this Entry. However, WREP's alternative requests in those motions that materials filed by Gaines be stricken as untimely or for reasons of formatting are denied.

2. Gaines' motion to grant summary judgment motion and to issue warning sanctions to the defendants is denied as without basis in law or fact. WREP's motion to strike that motion is sustained insofar as it is treated as an objection to Gaines' motion, and is denied to the extend that WREP seeks to have Gaines motion stricken.

3. Gaines' motion to prevent or help prevent the defendants' secondary retaliatory injury against the plaintiff, filed on July 25, 2002, is denied because the premise of such motion is misplaced in this action, either through the scope of the claims which are being litigated or the merit Gaines asserts those claims to possess. WREP's motion to strike the motion to prevent is treated as an objection to the motion to prevent, and as so treated is sustained, but is denied to the extent that WREP seeks to have the motion to prevent stricken.

4. WREP's motion to substitute the dated affidavits of various individuals, Ginny Suever, Pam Wolsiefer-Leak, Christie Hedge, Johnna

Krachinski, George Russell for their undated affidavits is granted. Gaines' motion to strike the undated affidavits of these individuals is denied.

5. With respect to Gaines' motion to determine admissibility of evidence of defendants' continuing violation and affidavit in support thereof, filed on October 23, 2001, the items appended to that motion are part of the expanded evidentiary record pertaining to the motions for summary judgment. The parties are thus notified that the items will be considered for that purpose, and to that extent Gaines' motion to determine admissibility is granted. The motion is denied to the extent that through such motion Gaines seeks to have a declaration of their admissibility, other than that the parties are notified that evidentiary materials will be considered to the extent consistent with the requirement of Rule 56(e) of the Federal Rules of Civil Procedure.

6. Gaines' motion to prevent defendants from making evasive, false and/or misleading representations in their reply to plaintiff's summary judgment motion, filed on October 23, 2001, is denied because through that motion Gaines attempts to reply to WREP's answer. A reply to the defendants' answer was not authorized, but the plaintiff's filing will be construed as a portion of his contentions in this motions.

7. Gaines' motion to strike Papier's appearance and to grant the requested summary judgment, filed on January 8, 2002, is denied because there is no basis on which to have attorney Papier's appearance stricken.

8. WREP's motion to amend answer, filed on February 13, 2002, is granted. The clerk shall file-stamp and docket the defendants' amended answer, and a copy of that document shall be included with the distribution of this Entry.

9. WREP's motion seeking an extension of the discovery cutoff date and an enlargement of time in which to respond to the plaintiff's motion for summary judgment are granted to the extent that any written discovery served prior to February 26, 2002, is considered timely and the defendants' response to the plaintiff's motion for summary judgment, filed on February 26, 2002, is deemed timely.

10. Gaines' motion seeking the maximum amount of time in which to respond to WREP's motion for summary judgment, filed on March 14, 2002, and April 19, 2002, are granted to the extent that Gaines filings in response to WREP's motion for summary judgment shall be deemed to have been timely filed. WREP's motions to strike and objections on grounds of timeliness are overruled.

11. Gaines' motion to strike WREP's filing in this action, including its motion for summary judgment and responses to Gaines's own filings, are each denied.

II. Remaining Non-Dispositive Motions

Each non-dispositive motion not specifically mentioned in Part I, of this Entry is denied. The reason for this ruling is that each such motion is without basis or significance in light of the claims, in light of the procedural development of the case,

and in light of the outcome which is compelled by the dispositive motions and the evidentiary record.

So ordered

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

Copies to:

Louis F. Gaines, 5337 N. College Avenue,
Indianapolis, IN 46220

Alan McLaughlin, Eric Papier, Baker & Daniels,
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Note To Clerk: Processing this document requires actions in addition to docketing and distribution.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES, Plaintiff	)	
v.	)	IP-01-1158-C-H/K
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	

ENTRY DISCUSSING MOTIONS FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

Louis F. Gaines has sued his employer, White River Environmental Partnership, and affiliated entities (collectively, "WREP") for what he asserts to be is discrimination against him on the basis of his race, sex and age and for retaliation against him. The parties each seek resolution of Gaines' claims through the entry of summary judgment.

The court, having read and considered the motions and responses thereto, and having also considered the evidentiary record, and being duly advised, now finds that WREP's motion for summary judgment must be granted, and that Gaines' motions for summary judgment must be denied.

I. Summary Judgment Standard

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Factual disputes are 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the [nonmovant]." *Oest v. Illinois Dep't of Corrections,* 240 F.3d 605, 610 (7th Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

Rule 56 requires more than bald assertions of the general matter asserted, *Drake v. Minnesota Mining Mfg. Co.,* 134 F.3d 878, 887 (7th Cir. 1998). Affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein and cite specific concrete facts establishing the existence of the truth of the matter asserted. FED. R. Civ. P. 56(e); FED. R. EVID. 602) witness permitted to testify only to those matters about which he or she has personal knowledge). Thus, the following are not properly included in an affidavit supporting or opposing summary judgment and will be disregarded: 1) conclusory allegations absent supporting evidence, *DeLoach v. Infinity Broad.,* 164 F.3d 398, 402 (7th Cir. 1999); *Aberman v. J. Abouchar & Sons, Inc.,* 160 F.3d 1148, 1150 (7th

Cir. 1998); 2) legal argument, *Pfeil v. Rogers,*

757 F.2d 860, 862 (7th Cir. 1985; 3) self-serving statements without factual support in the record; *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 682 (7th Cir. 1999); *Smith Bus. Admin. v. Torres*, 142 F.3d 962, 968 (7th Cir. 1998); 4) inferences or opinions not "grounded in observation or other first-hand experiences," *Visser v. Packer Eng'g Assocs, Inc.*, 924 F.3d 655, 659 (7th Cir. 1991); 5) mere speculation or conjecture, *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999); and 6) hearsay, *McFeely v. United States*, 700 F. Supp. 414, 417-418 (S. D. Ind. 1988). In addition, documents submitted in opposition to a motion for summary judgment must be properly identified by affidavit or otherwise admissible into evidence. See, e.g., *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987). The evidentiary materials submitted by the parties which comply with the foregoing standards will be considered in addressing the parties' motions for summary judgments, while the materials which do not comply with those standards will be disregarded. The motions to strike evidentiary materials, however, are denied.

II. Discussion

A. Statutory Overview

Title VII makes it an unlawful employment practice to discriminate against an individual on the basis of race, color, religion, sex, or national origin, 42 U.S.C. § 2000e-2(a). Title VII also provides that an employer may not take an adverse employment action or discriminate against an employee because he has opposed an unlawful

employment practice or has made a charge under the statue. See 42 U.S.C. § 2000e-3(a). The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. makes it "unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Other statutory provisions are described as warranted.

B. Timeliness and Scope of Claims

Gaines received a right to sue notice in Charge 240-99-1616 in July 1999. He had 90 days from the date of that receipt in which to file suit. He did not do so within the prescribed period, and the claims asserted here to the extent on No. 240-99-1616 are not available for resolution here. *Houston v. Sidley & Austin,* 185 F.3d 837, 830 (7th Cir. 1999); 42 U.S.C. § 2000e-5(f)(1).

Gaines filed a charge of discrimination with the EEOC in No. 240A10803 on January 22, 2001. Gaines' claims of race or sex discrimination based on event occurring before March 27, 2000 (300 days before January 22, 2001), and of age discrimination based on event occurring before July 26, 2000 (180 days before January 22, 2001), are time-barred. See *Harris v. Cook County Hospital,* 971 F. Supp. 329, 332 (N.D. Ill. 1997). Additionally, claims of race, sex, and age discrimination asserted in this action, but not included in No. 240A10803 or within the scope of that charge cannot be adjudicated in this action. *Cheek v. Peabody Coal Co.,* 97 F.3d 200, 202 (7th Cir. 1996) (citing *Harper v. Godfrey Co.,*

45 F.3d 143, 147-48 (7th Cir. 1995))

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C. Claims of Race, Sex and Age Discrimination

Gaines may prove his discrimination claims (race and sex under Title VII, and age under the ADEA) either by presenting direct evidence or by relying on the indirect, 'burden-shifting' method of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To avert summary judgment in an employment discrimination case, a plaintiff must present either evidence of discriminatory motivation or establish a prima facie case of discrimination under the *McDonnell Douglas* formula. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 940 (7th Cir. 1997).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon presumption or inference. *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). The direct evidence must show that the defendant said or did something indicating discriminatory animus with regard to the specific employment decision in question. Id.

Gaines has not offered direct evidence of discrimination on any prohibited basis.

Under the alternative method, in *McDonnell*

Douglas, the Supreme Court" established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory cases." *St. Mary's Honor Center, 509 U.S. at 506.* The test consists of three steps. First, the plaintiff must establish a prima facie case of discrimination. Second, once the prima facie case is established, the defendant must state a legitimate, non-discriminatory reason for the adverse employment action. Finally, if a legitimate, non-discriminatory reason is offered, the plaintiff must come forward to show that the stated reason is not the true one, but only a pretext to discrimination. See *McDonnell Douglas,* 411 U.S. at 802-04; *DeLoach v. Infinity Broadcasting,* 164 F.3d 398, 401 (7th Cir. 1999) (citation omitted).

* A prima facie case of racial discrimination requires a plaintiff to come forward with evidence that: 1) he is a member of a protected class; 2) he performed his job duties satisfactorily; 3) he suffered an adverse employment action; and 4) the employer treated similarly situated employees outside his protected classs differently. *Brummett v. Lee Enters., Inc.,* 284 F.3d 742, 744 (7th Cir. 2002); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.,* 254 F.3d 644, 650 (7th Cir. 2001).

* A prima facie case under the ADEA requires a showing that 1) the plaintiff is within the protected group, i.e. over the age of 40, 2) the plaintiff's work performance met his employer's legitimate expectations, 3) the plaintiff suffered an adverse employment action, and 4) a substantially younger employee was treated more

favorable. *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 065 (7th Cir. 1998).

All of Gaines' claims of discrimination require him to come forward with evidence that he suffered an adverse employment action. "[A] significant change in employment status" is necessary for an employment action to be considered adverse. *Bell v. Environmental Protection Agency*, 232 F.3d 546, 555 (7th Cir. 2000). An adverse change must be material, and "might be indicated by termination of employment, a demotion evidence by a decrease in wage or salary, a less distinguished title, a material loss of

benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Gaines did not suffer a significant change in employment status with respect to the treatment he described in Charge No. 240A10803 because the treatment or decision he describes, for the most part, did not "constitute [] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Stutler v. Illinois Dep't of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001).

Even for those items of alleged treatment that would constitute an adverse employment action,

Gaines cannot establish the final element of a prima facie case, which is that WREP treated similarly situated employees outside Gaines' protected class differently. Employees are similarly situated when there is substantial similarity with respect to their performance, qualifications, and conduct. *Radue v. Kimberty-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000). In cases involving allegations of discriminatory discipline, for example, the plaintiff must show that the two employees had the same supervisor, were subject to the same standards, and engaged in similar alleged misconduct. id. at 617-18. Gaines has not attempted that showing as to the majority of the specifications of his claims of discrimination, and as to the remaining claims he has simply identified other WREP employees he believes were treated more favorable than was he. Even as to this latter grouping; however, there is no evidence that the other WREP employees were similarly situated to Gaines in employment.

"Without a prima facie case, the plaintiff cannot withstand summary judgment." *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993) (citing *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1250 (7th Cir. 1990). Gaines' failure to present a prima facie case of discrimination under either Title VII or the ADEA compels the court to grant WREP's motion for summary judgment as to such claims.

D. Claims of Retaliation

As noted above, Title VII also provides that an employer may not take an adverse employment action or discriminate against an employee

because he has opposed an unlawful employment practice or has made a charge under the statue. See 42 U.S.C. § 2000e-3(a).

Gaines filed charges of discrimination against WREP on February 26, 2001, in No. 240A11100 and on August 6, 2001, in No. 240A12467. In each instance, Gaines alleged retaliation for having filed a previous charge of discrimination.

In *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640 (7th Cir. 2002), the Seventh Circuit Court of Appeals clarified the proper standard for summary judgment when a plaintiff claims that he was retaliated against for complaining about employment discrimination. With respect to a claim of retaliation, there is a direct evidence route to defeating a motion for summary judgment, as well as a modified *McDonnell Douglas* method. Under the direct method, a plaintiff must show that he engaged in protected activity and suffered an adverse job action as a result. Id. at 644.

The second route to summary judgment, adapting *McDonnell Douglas* to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, suffered an adverse employment action even though he was performing his job in a satisfactory manner. Id. Otherwise a trial must be held. Id.

Gaines' claims of retaliation cannot survive WREP's motion for summary judgment under

either of the above tests:

* First, Gaines has produced no direct evidence of an adverse employment action based on his prior EEOC filings.

* Second, Gaines has not provided any evidence that he, and not any similarly-situated employee who did not file an EEOC complaint, was subjected to an adverse job action.

As with Gaines' Title VII and ADEA claims of discrimination, the failure to present evidence of an adverse employment action leads to the entry of summary judgment for the defendants. "Absent of direct evidence of retaliation, failure to satisfy any element of the prima facie case proves fatal to the employee's retaliation claim." *Hilt-Dyson v. City of Chicago,* 282 F.3d 456, 465 (7th Cir. 2000). Even it the court found a prima facie claim of retaliation (or proceeded to a further step in the analysis without such a finding), WREP has shown legitimate reasons for the policies and decisions Gaines challenges throughout this case, and Gaines has not shown these reasons to be a pretext. *Russell v. Acme-Evans Co.,* 51 F.3d 64, 68 (7th Cir. 1995) ("Pretext ... means a lie, specifically a phony reason for some action."); *Adreani v. First Colonial Bankshares Corp.,* 154 F.3d 389, 395 (7th Cir. 1998) (to show pretext, a discrimination plaintiff must examine each reason given by the employer and must raise an issue of fact regarding the honesty and credibility of each of the reasons"). WREP's motion for summary judgment must be granted as to Gaines' claims of retaliation.

E. Remaining Statutory Claims

Gaines has also asserted claims under several other statues, but they add nothing substantive to his case.

* The Title VII analysis controls any claim asserted pursuant to 42 U.S.C. § 1981. *Johnson v. City of Fort Wayne,* 91 F.3d 922, 940 (7th Cir. 1996).

* WREP does not act "under color of state law" sufficient to support a claim under 42 U.S.C. § 1983. *Moore v. Marketplace Restaurant,* 754 F.2d 1336, 1352 (7th Cir. 1985) (Section 1983 plaintiff must "demonstrate that state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights").

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* There is no private cause of action recognized for an OSHA violation. See 29 U.S.C. § 653(b)(4); *Ellis v. Chase Communication, Inc.,* 63 F.3d 473, 477 (6th Cir. 1995); *Crane v. Conoco, Inc.,* 41 F.3d 547, 553 (9th Cir. 1994).

III. Conclusion

"Employers may act for many reasons, good and bad; they may err in evaluating employees' strengths; unless they act for a forbidden reason, these errors (more properly, differences in assessment) do not matter." *Kuhn v. Ball State Univ.,* 78 F.3d 330, 332 (7th Cir. 1996). Certain of

Gaines' claims in this case were not timely filed, while others are within the scope of the charge of retaliation filed with the EEOC. As to the remaining claims of discrimination, Gaines has failed to come forward with evidence of all elements of a prima facie case, and WREP has produced unrebutted evidence of legitimate, non-discriminatory reasons for its action. Gaines' claims of retaliation fail for the same reasons, and his remaining statutory claims also lack merit.

Because the failure of proof of any essential element as to which the nonmovant (Gaines, in this case) bears the burden of proof, is fatal, *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986), because the burden at this point rests with Gaines to 'inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," *Liberles v. County of Cook,* 709 F.3d 1122, 1126 (7th Cir. 1983), and because Gaines has not met his burden in these circumstances, WREP's motion for summary judgment must be granted. Gaines' own motions for summary judgment must also be denied for essentially the same reason, which is that he has failed to show that, based on the evidentiary record, he is entitled to judgment as a matter of law.

Judgment consistent with this Entry shall now issue.

So ordered.

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES. Plaintiff v. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	IP-01-1158-H/K

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the defendants' motion for summary judgment is granted, and judgment is entered for the defendants and against the plaintiff, and that this action is dismissed with prejudice.

The costs of this action are assessed against the plaintiff.

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

Copies to:

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Alan McLaughlin, Eric Paper, Baker & Daniels, 300 N. Meridian St., Suite 2700; Indianapolis, IN 46204.

UNITED STATES COURT Of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 12, 2003

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Ann Claire Williams, Circuit Judge

No. 02-3849

Louis F. Gaines,
Plaintiff-Appellant

v.

White River Environmental Partnership, et al.,
Defendant-Appellees

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 01 C 1158

David F. Hamilton, Judge

ORDER

On consideration of the petition for rehearing en banc filed by plaintiff-appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES,	)	IP 98-1741-C-M/S
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants.	)	

ENTRY DISCUSSING SECOND MOTION TO AMEND COMPLAINT AND SETTING DISCOVERY CONFERENCE

I. Second Motion to Amend Complaint

On June 1, 1999, the plaintiff filed his "second motion to amend complaint. The essence of this motion is that the plaintiff seeks to expand on his claims in this action by asserting the same claim which has been submitted to the EEOC in the form of a charge of discrimination, *No. 240-99-1616.

The charge of discrimination in No. 240-99-1616 was filed on May 4, 1999, and alleges retaliation and age discrimination from January 10, 1998 through April 20, 1999, and is included as an exhibit to the motion. Although the plaintiff

has requested a right to sue letter from the EEOC, no right to sue notice had been issued with respect to No. 240-99-1616 as of the filing of the plaintiff's motion on June 1, 1999.

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* A subsidiary portion of the second motion to amend amounts to the plaintiff's effort to bolster his claims with additional details he believes to be supportive of his claims. It is unnecessary and unhelpful to replead a claim with increasing detail. The details of the plaintiff's claims are precisely what discovery and various pretrial disclosures are designed to unveil.

No cognizable claim under Title VII could be stated in relation to events after January 10, 1998, until a right to sue notice has been issued. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). No amendment to a pleading should be permitted if the amendment would be futile, and an amendment would be futile if it could not withstand a motion to dismiss under Rule 12(b)(6). *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997).

Because the additional claim of discrimination which the plaintiff proposes to assert relating to the charge of discrimination in No. 240-99-1616 was filed on May 4, 1999, could not be maintained at this point (because no right to sue letter has been issued), the proposed amendment would be futile. The plaintiff's second motion to amend

is therefore denied.

The plaintiff's "proposed motion to amend complaint, filed on June 10, 1999, is duplicative of the second motion to amend complaint and is denied as such.

II. Discovery Conference

...

IT IS SO ORDERED

s/ LARRY J. McKINNEY, Judge
United States District Court

Date: August 19 1999

Copies to:

Louis F. Gaines, 5337 N. College Avenue, Indianapolis, IN 46220

Hudnall Pfeiffer, Carolyn Coleman, Baker & Daniels, 300 N. Meridian St., Suite 2700, Indianapolis, IN 46204

Glen Cunningham, Court Reporter

Pro Se Administrator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES,	)	
	)	
Plaintiff	)	
	)	
v.	)	IP-98-1741-C-M/C
	)	
WHITE RIVER ENVIRON-MENTAL PARTNERSHIP, et al.,	)	
	)	
	)	
Defendants	)	

ENTRY CONCERNING SELECTED MATTERS

The court, having considered the above action and the matters which are pending, now makes the following rulings:

...

3. In the court's Entry of August 19, 1999, in which it denied the plaintiff's second motion to amend complaint, the court based its decision on its understanding that the plaintiff had not received a right to sue notice from the EEOC with respect to charge No. 240991616 as the filing of the plaintiff's motion on June 1, 1999. Through inadvertence, the court did not acknowledge in its Entry of August 19, 1999, that on July 12, 1999, the plaintiff filed a copy of the right to sue notice

just described. In order to correct and clarify the record, the court now reconsiders the portion of its ruling of August 19, 1999, which denied the plaintiff's second motion to amend complaint.

a. The charge of discrimination in No. 240991616 was filed with the EEOC on May 7, 1999, and alleged retaliation and age discrimination occurring from January 5, 1999, through April 20, 1999, which was after the complaint in this action was filed. The right to sue notice relating to charge NO. 240991616 was issued on July 9, 1999.

b. The procedure posture of this action is as follows: the action was filed on December 18, 1998, the defendants filed a motion for summary judgment on July 9, 1999, and discovery is seemingly tumultuous. In *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774-75 (7th Cir. 1995), the Seventh Circuit cited a number of its published decisions which had affirmed the denial of a motion to amend after the filing, briefing or decision of a motion for summary judgment. The principal basis of the court's decisions in these cases was the unwarranted delay and burden an amended complaint would bring to the litigation.

c. The court finds that the present litigation also has progressed too far to permit the addition of entirely new claims, based on events unrelated to the events which supported the filing of the original complaint. A motion for summary judgment has been filed and the parties are embroiled in discovery concerns relating to the

claims in the amended complaint. Under these circumstances, the plaintiff's second motion to amend complaint, filed on June 1, 1999, remains denied. The ruling in Part I of the Entry issued on August 19, 1999, remains in effect, though modified by the additional factual matters noted in this Entry. For the same reasons, the plaintiff's third motion to amend complaint, filed on August 23, 1999, is also denied.

...

IT IS SO ORDERED.

s/ LARRY J. McKINNEY, Judge
United States District Court

Date: October 25, 1999

Copies to:

Louis F. Gaines, 5337 N. College Avenue, Indianapolis, IN 46220

Hudnall Pfeiffer, Carolyn Coleman, Baker & Daniels, 300 N. Meridian St., Suite 2700, Indianapolis, IN 46204.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT Of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 5, 2001
Decided March 23, 2001

Before

Hon. F. H. EASTERBROOK, Circuit Judge

Hon. D. A. MANION, Circuit Judge

Hon. D. P. WOOD, Circuit Judge

No. 00-3802	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
LOUIS F. GAINES, Plaintiff-Appellant	
v.	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendants-Appellees	No. 98-1741-C-M/S Larry J. McKinney, Chief Judge

ORDER

Louis Gaines, an African-American employed as an Operation Specialist for the defendant White River Environmental Partnership (WREP), filed

this employment discrimination suit in December 1998 under Title VII, 42 U.S.C. 2000e et seq., the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and 42 U.S.C. § 1981. The district court granted summary judgment for the defendants, holding that Gaines had not established a prima facie case of discrimination. Gaines appeals and we affirm.

...

No. 00-3802 Page 3

For the foregoing reasons, we Affirm the grant of summary judgment to WREP. All pending motions in this case are Denied.

UNITED STATES COURT OF APPEALS

For the Seven Circuit
Chicago, Illinois 60604

May 17, 2001

Before

Hon. F. H. EASTERBROOK, Circuit Judge

Hon. D. A. MANION, Circuit Judge

Hon. D. P. WOOD, Circuit Judge

No. 00-3802

LOUIS F. GAINES,
Plaintiff-Appellant

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 98-1741-C-M/S

Larry J. McKinney, Chief Judge

ORDER

Our order of March 23, 2001 affirmed the district court's grant of summary judgment to the defendants in Gaines's employment discrimination

suit. Because Gaines' claims were frivolous and his litigation strategy was marked by the filing of numerous motions and appeals containing spurious allegations of impropriety of Judge McKinney and defense counsel, we directed Gaines show cause why sanctions should not be imposed under Federal Rule of Appellate Procedure 38. Gaines has filed his response, and the matter is ready for decision.

Rather than present a reason not to sanction him, Gaines's response demonstrates that he wishes to continue to his frivolous litigation strategy. In his response, Gaines reiterates his belief that the defendants have violated his rights, asserts that all of his filings were necessary to defend his rights, and suggests that we should sanction the defendants rather than him. Furthermore, three days after he filed his response Gaines filed a petition for rehearing of his appeal, once again raising the same frivolous claims of discrimination.

Gaines is hereby sanctioned $1,000 for filing a frivolous appeal. Gaines shall tender a check payable to the Clerk, United States Court of Appeals, in the amount of $1,000 by May 30, 2001. Furthermore, we DENY his petition for rehearing.

UNITED STATES CONSTITUTION:

Fifth Amendment: ..., nor deprived of life, liberty, or property, without due process of law.

Eighth Amendment: ..., nor excessive fines imposed; nor cruel and unusual punishment inflicted.

Thirteenth Amendment, Section I: Neither slavery nor involuntary servitude, ..., shall exist within the United States, or any place subject to their jurisdiction.

TITLE 29, U.S.C. §§:

623(a): It shall be unlawful for an employer - (1) ... or otherwise discriminate against any individual with respect to his compensations, terms, conditions or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; (3) to reduce the wage rate of any employee in order to comply with this chapter.

623(d): It shall be unlawful for an employer to discriminate against any of his employees ..., because such individuals ... have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

TITLE 42 U.S.C., §§:

1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1981(c): The rights protected by this section are protected against impairment by non governmental discrimination and impairment under color of State law.

2000e-2(a): It shall be an unlawful employment practice for an employer - (1) ..., to discriminate against individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2000e-2(k)(c)(2): A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

2000e-2(m): Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

2000e-3(a): It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FEDERAL RULES OF:

Appellate Procedure, Rule 35

(a) When Hearing Or Rehearing En banc May Be Ordered. A majority of the current judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the courts decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc:

(1) the petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflict case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge call for a vote.

Civil Procedure, Rule 56:

(c) Motion and Proceedings Thereon: ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitle to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to amount of damages.

(e) Form of Affidavits; Further Testimony; Defenses Required: ... The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of the adverse party pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Evidence, Rule 406:

Habit; Routine Practice. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person, or organization on a particular occasion was in conformity with the habit or routine practice.